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Criminal Law

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CRIMINAL LAW

CRAIGO v. HEY, 345 S.E.2d 814 (W. Va. 1986).

Appointment of Counsel for Indigent Prisoners—Civil Procedure—Criminal Law—Criminal Procedure

After a petition for a writ of mandamus to the West Virginia Supreme Court of Appeals for the Kanawha County Circuit Court's refusal to docket a civil action brought by Mr. Robert G. Craigo, Chief Judge A. Andrew MacQueen reinstated Craigo's action to the active docket and the West Virginia Supreme Court of Appeals dismissed the mandamus petition as moot.

Mr. James M. Oxier petitioned the West Virginia Supreme Court of Appeals for a writ of mandamus to compel the Circuit Court of Randolph County to appoint counsel for alleged personal injury actions. The defendant filed motions to dismiss on the gounds that the suits were brought outside the two year statute of limitations. Oxier claimed he had no attorney, none would take his case, and he did not possess the legal knowledge to prosecute the cases himself.

The issues in this case were: (1) Whether prisoners have a right to court-appointed counsel in ordinary civil actions; and (2) whether guidelines can be established for the appointment of counsel for indigent prisoners.

In awarding the writ as moulded, Justice Neely stated that although trial courts have no duty to appoint counsel to represent indigent civil litigants, imprisoned or not, title 28, section 1915 of the United States Code and section 59-2-1 of the West Virginia Code endow trial courts with the discretion to do so. The courts must exercise this on a case by case basis, but certain classes of cases may be identified where appointment of counsel will usually be proper, and where it will not be proper. Three classes emerge: (1) Civil cases such as divorce, paternity, or termination of parental rights where the state has traditionally provided legal aid. Prisoners have no right to counsel as plaintiffs in such cases, however, unless they can show that they will forfeit some important right if not permitted to attend court before their release dates; (2) fee generating cases, such as the personal injury claim brought by Mr. Oxier. Prisoners may file suit in forma pauperis, but unless there are extraordinary circumstances, the court should not appoint counsel. One qualification to this majority position should be noted, in that the trial courts should maintain a roster of lawyers willing to undertake fee generating litigation on behalf of indigent prisoners, and provide prisoners with such updated lists annually; (3) civil rights cases, in which the following factor test should be applied—(a) are the merits of the claim colorable, (b) has the indigent plaintiff the ability to investigate crucial facts, (c) does the nature of the evidence indicate that the truth will more likely be exposed where both sides are represented by counsel, (d) is the litigant capable of presenting the case, and (e) how complex are the legal issues raised. If the trial judge decides, after applying

the above test, to appoint counsel, the appointment shall last at least through the preparation of the complaint. Whether to continue the assignment beyond this point is in the sound discretion of the circuit court. Accordingly, it was within the discretion of the Circuit Court of Randolph County whether to appoint counsel in the instant case. The court was directed to prepare a list of lawyers willing to review Mr. Oxier's fee generating claims, and to make this available to him.

STATE v. CARPER, 342 S.E.2d 277 (W. Va. 1986).

Criminal Law—Criminal Prodedure—Distribution of Marihauna—Mandatory Probation

In the Circuit Court of Nicholas County, the defendant had been sentenced to one to five years in the penitentiary and a $10,000 fine after he pleaded guilty to the delivery of less than fifteen grams of marihauna without remuneration. Despite sections 60A-4-402(c) and 60A-4-407 of the West Virginia Code mandating that such offense entitles one guilty of a first offense for such distribution to mandatory probation, the court deemed these sections applicable only to professional persons such as physicians and pharmacists who are licensed to dispense controlled substances.

The court discussed two issues: (1) Whether these two provisions of the West Virginia Code must be read *in pari materia*, so that probation is mandatory; and (2) whether section 60A-4-402 of the West Virginia Code is solely confined to professional persons dispensing controlled substances.

The court found that section 60A-4-407 of the West Virginia Code was construed as mandating probation for a first offense possession of less than fifteen grams of marihauna. In addition, subsections (a)(4) and (a)(5) of section 60A-4-402 of the West Virginia Code were written in language sufficiently general to apply to any person, not merely those registered or licensed by the state. Moreover, the traditional rule is that penal statutes must be strictly construed against the State and in favor of the defendant. It only remains for a defendant to establish that this was his first drug-related offense. If this was the case, he would have been entitled to mandatory probation.

STATE v. FITCHER, 337 S.E.2d 918 (W. Va. 1985).

Criminal Law—Criminal Procedure—Uniform Controlled Substances Act

The Circuit Court of Wood County had dismissed an indictment against appellee for delivery of cocaine on the ground that it failed to charge a crime. The State appeals from this order.

The court addressed three issues in the case: (1) Whether delivery of cocaine is a crime under the Uniform Controlled Substances Act, (2) whether cocaine is a proscribed substance under the Act, and (3) whether the failure to state whether cocaine is a narcotic or non-narcotic drug renders the indictment insufficient.

In reversing the circuit court's judgment, the court held that the description of cocaine in section 60A-2-206(b)(4) of the West Virginia Code (1985) clearly lists cocaine as a schedule II controlled substance, thus making the defendant's argument without merit. His description of cocaine as a derivative of non-decocainized coca leaves was inaccurate. An indictment is sufficient when it clearly states the nature and cause of the accusation against a defendant, enabling him to prepare his defense and plead his conviction as a bar to later prosecution for the same offense. Therefore, the court's dismissal was in error.

STATE v. TAYLOR, 346 S.E.2d 822 (W. Va. 1986).

Criminal Law—Elements of Indictment—Transferring stolen property

The Circuit Court of Monongalia County had dismissed a two-count indictment charging the defendant with transferring stolen goods in violation of section 61-3-18 of the West Virginia Code, on the theory that it failed to allege an essential element of the crime charged, *i.e.*, that the defendant bought, received, or aided in the concealment of the stolen goods prior to his transfer of the goods to a person other than the owner.

The sole issue in this case was whether, despite the commonality in the elements of offenses relating to stolen property in section 61-3-18 of the West Virginia Code, are the offenses listed therein separate and distinct, so as to obviate the need to list each and all of them in an indictment for the transfer of stolen property.

The court held that the use of the disjunctive "or" and the history of the statute support the view that it contains separate offenses. There is a sufficient disparity between the crime of transferring stolen property from that of receiving or aiding the concealing of stolen property to conclude that it is a separate offense, so that the element of concealing the stolen property need not be present in an indictment for the crime of transferring that property. Nor was it necessary to aver that the defendant obtained the goods from another person before he transferred them, as this was not an element of the crime.

STATE v. TAYLOR, 337 S.E.2d 923 (W. Va. 1985).

Criminal Law—Criminal Procedure—Entrapment—Jury Instructions

In this case, the Circuit Court of Wood County sentenced the defendant to imprisonment for a term of one to five years upon his conviction by a jury of delivery of a controlled substance. The principal witness against the defendant was an undercover narcotics officer to whom Taylor gave a bag containing 0.7 grams of marihauna, after Taylor had invited the officer to "get high," and helped him obtain a packet of phencyclidine from another person.

The principal issues were: (1) Whether the State's evidence was such that...the appellant was entrapped as a matter of law into making the transfer of the ma-

rihauna, and (2) whether the court's instruction to the jury defining the defense of entrapment was error.

The court held that the critical factor in entrapment is whether the unlawful scheme originated with the law enforcement officer or with the accused. Only if the officer conceived the plan and procured or directed its execution in such an unconscionable way that he could be said to have created the crime in order to make an arrest and obtain a conviction will a court be warranted in finding entrapment. Here the State's evidence was such that reasonable minds could differ as to whether the officer's conduct rose to an unconscionable level. Thus, the refusal of a directed verdict for the appellant was correct. The instruction used by the court to the jury, moreover, appeared to be widely accepted as a correct and complete statement of the law.

STATE v. WALLACE, 337 S.E.2d 321 (W. Va. 1985).

Criminal Law—Criminal Procedure—Evidence—Lesser Included Offense—Sexual Misconduct

In this action, the defendant, in the Circuit Court of Kanawha County, sought to force the State to proceed to the jury only on the greater offense contained in the indictment by objecting to the State's lesser included offense instruction, in order to force a choice between either a conviction on first degree sexual assault or acquittal, on charges of compelling defendant's seventeen-year-old babysitter to have both vaginal and oral intercourse with him by forcible compulsion when she was not the defendant's voluntary social companion. The jury found the defendant guilty of two counts of sexual misconduct—a misdemeanor.

The court addressed three issues in this case: (1) Whether sexual misconduct is a lesser included offense of first degree sexual assault; (2) whether the State is entitled to an instruction on lesser included offenses over a defendant's objection; and (3) whether the evidence herein warranted an instruction on the lesser included offense.

The court held that upon analysis of case law and subsections 61-8B-2(a) and (b) of the West Virginia Code, it is clear that the elements which make up the crime of sexual misconduct are included as elements of first degree sexual assault. The court stated that only when there is no evidentiary dispute or insufficiency on the elements distinguishing the greater from the lesser offense is the defendant not entitled to a lesser included offense instruction. In this case, there was a substantial conflict over the forcible compulsion issue, which is the main element distinguishing the two offenses, so a lesser included offense instruction was clearly warranted here. Decisions from other jurisdictions and our own case law produce the conclusion that a defendant does not have the right to preclude the State from offering a lesser included offense instruction when it is determined that the offense is legally lesser included and that such an instruction is warranted by the evidence.

STATE v. WILLIAM T., 338 S.E.2d 215 (W. Va. 1985).

Criminal Law—Criminal Procedure—Evidence—Juvenile Proceeding—Verdict Contrary to the Evidence

The Juvenile Court of Wood County had adjudicated the defendant a delinquent for committing petit larceny at Hart's Department Store, and had committed him for up to one year at the Industrial Home for Youth at Salem. Defendant's motion for a judgment of acquittal on the grounds that the evidence was insufficient to prove larceny, although it might establish the offense of shoplifting, was denied.

The issues were: (1) Whether the State met its constitutional burden to prove the juvenile's guilt beyond a reasonable doubt; (2) whether the requirements for a conviction for larceny, *i.e.*, trespass against the owner's possession, and asportation were sufficiently proven by the State; and (3) whether the evidence was "manifestly inadequate" so as to produce injustice, which alone warrants interference with a verdict of guilt.

The court held that since an adjudication of deliquency is subject to the same standards of review on appeal as is a criminal conviction, the evidentiary standard of *State v. Starkey*, 161 W. Va. 517, 24 S.E.2d 219 (1978) applied here. The evidence was sufficient to uphold the trial court's determination. Both elements of larceny were also sufficiently proven. The State met its burden sufficiently to convince impartial minds of the guilt of the defendant beyond a reasonable doubt, and no interference with the verdict was warranted.

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See also,

ADMINISTRATIVE LAW:
Kimes v. Bechtold, 342 S.E.2d 147 (W. Va. 1986).

CRIMINAL PROCEDURE:
In re *Mendez*, 344 S.E.2d 396 (W. Va. 1985).
State v. Graveley, 342 S.E.2d 186 (W. Va. 1986).
State v. Matney, 346 S.E.2d 818 (W. Va. 1986).